

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**RE: PETITION OF BAY STATE GAS COMPANY
FOR APPROVAL OF REVISED TARIFFS**

DTE 05-27

**LOCAL 273 MOTION FOR CLARIFICATION
AND
MOTION TO EXTEND APPEAL PERIOD**

I. INTRODUCTION

Local 273 of the Utility Workers Union of America (“Local 273”) respectfully moves for clarification of the Department’s November 30, 2005 Order (“Order”). Specifically, Local 273 seeks clarification of whether footnote 236 (“n. 236”) on page 419, taken in context of the entire “Quality of Service” discussion (Order, § X) and the specific decision to “open a new investigation” into Bay State’s “compli[ance] with the statutory mandate set out in [G. L. ch. 164] Section 1E” (Order, at 418 - 419), is intended to bar Bay State from moving forward with any layoffs or job reclassifications (“adverse job actions”) pending the completion of that new investigation.¹ Local 273 reads the Order as so prohibiting adverse job actions, and seeks clarification to this effect.

Local 273 also moves the Department to extend the period for filing appeals until twenty

¹ Local 273 recognizes that the Department may need to allow limited exceptions, based on unique and specific circumstances, from any otherwise global prohibition on job layoffs or reclassifications, such as were agreed to between Local 273 and the Company during the pendency of this proceeding. *See* June 30, 2005 Letter from Steve Bryant to Kevin Friary, appended to August 5, 2005 “Local 273 Notice of Withdrawal of Motion to Preserve Status Quo” (carving out exception for 12 rebadged NiSource employees).

days after the Department's final decision or action of this Motion for Clarification.

II. MOTION FOR CLARIFICATION: STANDARD FOR REVIEW

The Department has routinely considered clarifying previously issued orders when the order is silent as to the disposition of a specific issue requiring determination or when the order contains language so ambiguous that its meaning is in doubt.² Here, Local 273 rests its motion on ambiguity in § X of the Order, especially n. 236, as to whether Bay State may proceed with adverse job actions, pending the Department's staffing-related investigation announced in the same section of the Order.

III. MOTION FOR CLARIFICATION: ARGUMENT

N. 236, in its entirety, reads as follows:

There is record evidence, discussed in this Order at Section V.D, that the contemplated IBM Global Agreement may result in a management decision to move the functions of a number of Bay State's direct employees to contract status. **In light of our pending Section 1E review, such a decision, if contemplated, may be premature.**

Order, p. 419, n. 236 (emphasis added). The highlighted language is ambiguous through the use of the phrase "may be premature," reinforced by the fact that neither the footnote itself, nor the ordering paragraphs on page 443, nor any other portion of the Order explicitly bars Bay State from proceeding with adverse job actions pending the outcome of the new investigation.

² See, e.g., Entry and Exit Barriers and OSP Rate Cap, DTE 97-88/97-18 (Phase II-A) (1999), Order on Motions for Reconsideration and Clarification: "Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989)."

Local 273 believes that n. 236 and the Department's decision make little sense, if Bay State still has the discretion to proceed with adverse job actions, for reasons more fully explained immediately below. At the outset, however, Local 273 notes that the Department's Chairman has been quoted in publicly-available sources as himself reading the Order as prohibiting adverse job actions.³ While Local 273 does not suggest that these extra-judicial statements are binding rulings, they do support Local 273's position that the Order, as worded, is ambiguous and does not clearly reflect the Department's apparent intent to bar adverse job actions.

In its Order, the Department has taken the unprecedented step of opening an investigation into a utility company's "staffing levels;" the utility's compliance "with the statutory mandate set out in Section 1E" of G. L. ch. 164; and whether the utility "has engaged in labor displacements that are below statutorily-mandated staffing levels or that otherwise may impede service quality." Order, at 417 - 419. Further, the opening of this unprecedented investigation is premised on finding "evidence that NiSource has engaged in significant staff reductions, reduced its infrastructure investment, and curtailed sales efforts." *Id.* at 303. In the Order, the Department has expressed its concerns that "NiSource has effectively taken control of staffing and other business matters from local Bay State management, and failed to respond in a timely manner

³ For example, an article in the December 1, 2005 (Springfield) Republican, "Utility gas rate hike halved," contained the following statement: "However, as part of the decision yesterday, the Department of Telecommunications and Energy **ordered the utility to maintain those jobs pending an investigation into its business practices**, especially its staffing levels, said the department's chairman Paul G. Afonso." The article also attributed this quote directly to the Chairman: "It's hard to square those commitments [i.e., the promises made in the merger docket DTE 98-31] with the outsourcing of 100 jobs that are an important component of the economy of Western Massachusetts. So right now, **those jobs should be at a standstill until we reconcile the issue.**" (Bold emphasis added).

when local management urged NiSource to allow additional hirings in order to meet acceptable standards;” along with its concerns that “Merriville (Nisource’s headquarters) is at least as much, and maybe even more the subject of our investigation as Westborough (Bay State’s local headquarters).” *Id.* at 303 - 304.⁴

The Department has never before issued such a strongly-worded order regarding any company’s staffing levels and the potential impacts on service quality, nor has the Department ever before so closely focused on the potential ill-effects on Massachusetts consumers of the relationship between a state-regulated utility and its parent company. But as if the language of the Order quoted above were not sufficient to drive the point home, the Order also succinctly and powerfully highlighted for NiSource that “[t]his is serious business, and we advise NiSource to so regard it.” *Id.*, at 304.

In this context, it is unimaginable that the Department intended to allow NiSource or Bay State to proceed with adverse job actions pending the outcome of the just-announced investigation, but the Order is ambiguous on this point. The Department should grant Local 273’s request for clarification.

It is worth noting that on June 13, 2005, near the outset of the proceeding, Local 273 filed a “Motion to Preserve Status Quo and Preserve Department’s Jurisdiction Pending Final

⁴ *See, also*, Order, at 411 (noting staffing decline from 811 employees in 1998 to 586 in 2005, and threatened loss of 100 additional jobs); at 417 (“the motivation for this displacement may stem as much, if not more, from Bay State’s parent as from the Company itself”); at 418 (“present docket raises questions not so much about Bay State’s local management in Westborough . . . but about NiSource’s management decisions from Merriville”).

Decision.”⁵ Many of the factual premises for Local 273’s Motion to Preserve Status Quo have since been adopted or recognized by the Department in its Order, including the likelihood that the signing of the contract with IBM may lead to significant, additional staff reductions, particularly in the areas of telephone call answering and customer billing (Order, at 411), and the likelihood that NiSource’s control over resource decisions may be adversely affecting service quality (Order, at 417 -419). Moreover, the Department has unequivocally stated both its intent to fully investigate these issues and its legal authority to do so under G. L. ch. 164, §§ 1E, 76, 76A, and 85. Order, at 304, 417 - 419. Thus, there is far more reason now than when this proceeding began for the Department to preserve the status quo by clarifying that Bay State may not engage in adverse job actions until the issuance of a final order in the just-announced new investigation.

IV. MOTION TO EXTEND APPEAL PERIOD

Pursuant to 220 C.M.R. 1.11(11), Local 273 respectfully requests that the Department extend the judicial appeal period allowed under G. L. ch. 25, § 5 until 20 days after a final ruling or other disposition of the present Motion for Clarification. Rule 1.11(11) specifically contemplates the granting of such extensions. The Department should do so here to avoid parties filing appeals before all issues have been finally resolved by the Department.

⁵ In response, the Company voluntarily agreed not to proceed with adverse job actions (with some limited exceptions regarding reclassified, non-union employees), and Local 273 withdrew its motion on August 5, 2005, noting the Company’s agreement.

In conclusion, Local 273 respectfully asks the Department to grant its Motion for Clarification and Motion to Extend Appeal Period.

Respectfully Submitted,

Charles Harak, Esq.
Counsel for Local 273
77 Summer Street, 10th floor
Boston, MA 02110
617 988-0600 (ph)
617 523-7398 (fax)
charak@nclc.org

DATED: December 16, 2005

MotionClarification.wpd